95CV03560-ILG-MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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THOMAS CARTER,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE HEATH AND HOSPITAL CORPORATION OF THE CITY OF NEW YORK, KINGS COUNTY HOSPITAL AND KINGS COUNTY HOSPITAL CENTER POLICE DEPARTMENT, FIRST DIVISION,

Defendants.
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MEMORANDUM AND ORDER
95-CV-3560(ILG)

GLASSER, United States District Judge:

After being reassigned from his job as "Detective" in the Investigations Unit of the Kings County Hospital Center ("KCHC"), Thomas Carter ("Carter"), an employee of the New York City Health and Hospitals Corporation ("HHC"), brought this Title VII action against the City of New York, the KCHC (a subsidiary corporation of the HHC), the HHC and the KCHC Police Department, alleging that he has been discriminated against on the basis of his race. Defendants now move for summary judgment. For the following reasons, defendants' motion is granted.

FACTS

Carter, an African-American, has been employed by the HHC at the KCHC as a "Special Officer" assigned to patrol duty

since February 2, 1987 and continues to be employed in that title at the present time. Complaint at ¶ 1; Goldstein Dec. at ¶ 5. "Special Officers" at KCHC are responsible for "protecting the life and property of all persons on KCHC property and in KCHC facilities . . . by patrolling, securing, inspecting and guarding all KCHC facilities." Goldstein Dec. at ¶ 7.

In September 1992 Carter was designated a "Detective" and in March 1993, was assigned to the "Investigations Unit" at the KCHC. Id. at ¶¶ 11-12. The Investigations Unit at KCHC is a specialized unit of the KCHC Police Department, which is responsible for investigating all criminal activity on KCHC grounds. Retas Dec. at ¶ 4. The Investigations Unit is headed by Hospital Security Officer (Captain) Steven P. Retas ("Retas"). Id. Other than Carter and Retas, the "Investigations Unit" was staffed by three other KCHC Police employees, all African-American. Retas dec. at ¶¶ 6, 17; Goldstein Dec. at ¶ 21. Despite his new designation as Detective and appointment to the Investigations Unit, Carter remained in the civil service title of "Special Officer" and did not receive an increase in salary. Id.

During his tenure in the Investigations Unit, Carter's attendance was far from satisfactory. He was absent a total of sixty-five days in the thirteen months he was assigned to the unit. Retas Dec. at ¶ 10; Exhibit A to Retas Dec at 2. Of the

sixty-five absences, thirty-one occurred between January 1, 1994 and April 26, 1994, Carter having worked only forty-seven days of a possible seventy-eight days during that period. Retas Dec. at ¶ 10; Exhibit A to Retas Dec at 2. Despite verbal and written warnings, see Exhibit B to Retas Dec.; Retas Dec. at ¶ 12, Carter's excessive tardiness and absences persisted. Retas Dec. at ¶ 14. By letter dated April 26, 1994, Retas reassigned Carter from the Investigations Unit back to patrol duty, citing a lack of "good attendance and punctuality" as cause. Exhibit C to Retas Dec.[1]

Following his reassignment, Carter filed a complaint with the New York State Division of Human Rights on October 6, 1994. That agency forwarded the plaintiff's complaint to the Equal Employment Opportunity Commission ("EEOC"). Exhibit B to Jones Dec. The EEOC sent plaintiff a "Right to Sue" letter on May 24, 1995, Def. 56.1 Stat. at ¶¶ 129-130, and on August 30, 1995, plaintiff filed the present suit, asserting the following causes of action: discrimination on the basis of race, hostile work environment, harassment and constructive discharge in violation of Title VII of the Civil Rights Act; violations of 42 U.S.C. ¶¶ 1981 and 1983; discrimination pursuant to New York Executive Law ¶¶ 296 and 297; and breach of implied contract

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[1] Carter's replacements in the Investigations Unit have all been African-American as well. Goldstein Dec. at ¶ 21.

under New York common law.[2]

Carter claims that several incidents which occurred during his term in the Investigations Unit and after his reassignment to patrol duty amounted to a "pattern of harassment and discrimination," Complaint at ¶ 28, and that "plaintiff's demotion and the proffered reason [excessive tardiness and absences]. . . were used as a pretext to discriminate against plaintiff based on his race." Id. at ¶ 23. In addition, plaintiff points to several other incidents to support his claims that he has been denied equal terms, conditions or privileges of employment because of his race. Id. at ¶¶ 53-55.

Plaintiff's Claimed Incidents of Discrimination

In March 1994, Carter participated in the arrest of two white KCHC employees. Complaint at ¶¶ 18, 23. He alleges that his

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[2] Since the filing of this lawsuit, plaintiff has voluntarily withdrawn his claims for constructive discharge and breach of implied contract. See Pl. Memo of Law at 4. In addition, although plaintiff did not assert a claim for retaliation in either his complaint here or with the State Division of Human Rights, *see* Exhibit B to Jones dec., he states in his opposition papers "the defendants . . . have discriminated against me in retaliation for complaining about their preferential treatment of two white male KCHC employees." Carter Aff. at ¶ 5. Because "[a] district court only has jurisdiction to hear Title VII claims that either are included in an EEOC charge or are based on conduct subsequent to the EEOC charge which is 'reasonably related' to that alleged in the EEOC charge," Butts v. New York Dep't of Housing Preservation & Dev., 990 F.2d 1397, 1401 (2d Cir. 1993), this court declines to hear plaintiff's claim for retaliation.

"demotion" came as a result of his objection to alleged favoritism shown toward the two white employees in processing their arrest by Retas in the Investigations Unit rather than at KCHC Police headquarters. Id. Retas, however, avers that such arrests were for non-violent offenses, which are regularly processed in the Investigations Unit. Retas Dec. at ¶ 26.

In addition, plaintiff claims racial discrimination might be inferred from the fact that Retas denied him use of a beeper while his two female counterparts where given beepers. Exhibit B to Jones Dec. Retas, in turn, points to a lack of resources as the reason plaintiff did not receive a beeper. Def. Memo of Law at 9. Moreover, plaintiff claims racial discrimination based on Retas' assignment of "another Detective [one Detective Parker] to monitor plaintiff's time and attendance." Complaint at ¶ 17; Def. Memo of Law at 9. Retas states that he appointed Detective Parker to assume all of his duties during his leave of absence, such duties including the monitoring of time and attendance for all member of the Investigations Unit. Retas Dec. at ¶ 27.

Following his reassignment to patrol duty, Carter claims he was assigned to more dangerous posts in comparison to other Special Officers. For example, Carter points to his assignment to guard a patient whose "boyfriend had threatened to come to the hospital and shoot her . . . while there were

numerous other Caucasian officers available to guard [the] patient." Complaint at ¶ 28. In addition, Carter claims that "on or about August 25, 1994, he was called to subdue "numerous violent, emotionally disturbed patients," Id. at ¶ 33, even though he was originally assigned to guard a different post and the Caucasian officer assigned to that post was not called to help. Id.

Defendants have brought the present motion for summary judgment under Fed. R. Civ. P. 56(c), contending that plaintiff has failed to establish a *prima facie* case of racial discrimination; that plaintiff cannot establish a policy or custom of discrimination to support his Section 1981 and 1983 claims; and that this Court should decline to exercise supplemental jurisdiction over plaintiff's state law claims. For the reason set forth below, defendants' motion is granted.

DISCUSSION[3]

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[3] At the outset of defendants' motion, defendants note that "plaintiff commenced this action more than ninety days following the presumed receipt of his right to sue letter from the [EEOC]. . . [P]laintiff's right to sue letter is dated May 24, 1995 [but] plaintiff did not commence this action until August 30, 1995 . . . . As a result, under applicable case law plaintiff's Title VII claims should be barred in their entirety." Def. Memo of Law at 5, n.1. Although defendants' statement of the law is correct, see Cornwell v. Robinson, 23 F.3d 694, 706 (2d Cir. 1994) ("[Title VII] suit must be commenced not more than 90 days after receipt of the right-to-sue letter [from the EEOC]."), defendants

I. Standard for Summary Judgment

Summary judgment under Rule 56 is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of proof on such motion. United States v. All Funds, 832 F. Supp. 542, 550-51 (E.D.N.Y. 1993).

If the summary judgment movant satisfies its initial burden of production, the burden of proof shifts to the nonmovant who must demonstrate that a genuine issue of fact exists for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a jury could return a verdict in his favor. Id. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. ,v. Zenith

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presume that the plaintiff received the right-to-sue letter three days following the date of the letter. However, plaintiff alleges in his complaint that he received his right-to-sue letter on June 2, 1995 and timely filed the present lawsuit on August 30, 1995, within the ninety period. Complaint at ¶ 37. Because defendants' motion for summary judgment can be granted on the merits, the Court need not decide this issue. At oral argument, the City advised the Court they did not wish to pursue this argument.

Radio Corp., 475 U.S. 574, 586 (1986). Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. Once the nonmovant has adduced evidence of a genuine issue of material fact, his "allegations [will be] taken as true, and [he] will receive the benefit of the doubt when [his] assertions conflict with those of the movant." Samuels v. J. Mockry, et al., 77 F.3d 34, 36 (2d Cir. 1996).

In employment discrimination cases, courts are particularly cautious about granting summary judgment where intent is at issue. See Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997). However, even in these cases a "plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Id.

II. Title VII

The relevant section of Title VII, 42 U.S.C. § 2000e-2, declares it to

> be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because

> of such individual's race, color, religion, sex, or national origin; . . .

The Supreme Court has set forth the allocation of burdens and order of presentation in a Title VII case in three decisions, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). First, "the plaintiff has the burden of proving by a preponderance of evidence a *prima facie* case of discrimination." Burdine, 450 U.S. at 252-53. Second, "if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the [adverse employment decision]." Id. at 253. Third, "should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Id.

To establish a *prima facie* case of discrimination, plaintiff is required to establish (1) that he is an African-American, (2) that he was qualified for his position at KCHC, (3) that he was subject to an adverse employment decision, and (4) that the decision occurred under circumstances giving rise to an inference of discrimination. See McDonnell Douglas, 411 U.S. at 802.

Defendants concede that Carter has satisfied the first two requirements that must be met to establish a *prima facie* case, that he is an African-American and therefore a member of a protected group and that he was qualified for his position. They argue, however, that he has not satisfied the fourth requirement because Carter's reassignment did not occur under circumstances giving rise to an inference of racial discrimination.[4]

A. Reassignment and the Inference of Racial Discrimination

Carter has provided no support for his claim that the decision to reassign him occurred under circumstances giving rise to an inference of discrimination. Despite plaintiff's contentions that his demotion and mistreatment were made on the basis of his race, he does not cite to any admissible evidence that would create an issue of material fact. See Pl.'s 56.1 Statement; see also Local Civil Rule 56.1 (d).

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[4] Regarding the third requirement that must be met to establish a *prima facie* case of discrimination, i.e., that Carter was subject to an adverse employment decision, defendants' do not concede that plaintiff can satisfy that requirement either. Although they do not brief this issue, defendants note that "plaintiff's reassignment from the Investigations Unit back to patrol duty involved no change in plaintiff's civil service title (Special Officer), his in-house designation (Detective), and his salary." Def. Mem. of Law at 7, n. 2; Def. 56.1 at ¶¶ 84-86. Because the plaintiff has failed to meet its burden of showing that his reassignment and treatment occurred under circumstances giving rise to an inference of discrimination (the fourth requirement), this Court need not entertain the merits of this argument.

Carter argues that he was "discriminated against in retaliation for complaining about [the] preferential treatment of two white male employees." Carter Aff. at ¶ 5. However, as noted above, a "plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Schwapp, 118 F.3d at 110. Carter simply cannot rest on his conclusory allegations and withstand a motion for summary judgment.

Carter also argues that he need not show that his reassignment was motivated solely by his race, but rather that his race was *one* of the motivating factors.[5] Carter, however, has not proffered *any* evidence suggesting that race was a factor in his reassignment. For example, although the complaint alleges that Carter was treated differently from similarly situated

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[5] Although Carter claims that his case may be one involving mixed motives, the procedural framework urged upon the Court by both parties is that of McDonnell Douglas rather than Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In any event, the result would be the same under the latter framework. When asserting a mixed motive claim, a plaintiff must show that the discriminatory criterion was a "motivating" or "substantial" factor in the decision. The burden upon plaintiff is therefore greater under Price Waterhouse than under McDonnell Douglas. De la Cruz, 82 F.3d 16, 23 (2d Cir. 1996).

Caucasian officers, Complaint at ¶¶ 28, 33, Carter has adduced no evidence supporting this assertion.

B. Hostile Work Environment/Harassment

Nor can plaintiff make a valid claim for hostile work environment or harassment. To state a claim for racially hostile work environment under Title VII, the plaintiff must demonstrate that his "workplace is permeated with discriminatory intimidation, ridicule, and insult," Harris v. Forklift Systems, 510 U.S. 17, 21 (1993) (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986)), so as to "alter the conditions of the victim's employment and create an abusive working environment." Id. Conduct that is "merely offensive" and "not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile -- is beyond Title VII's purview." Harris v. Forklift Systems, 510 U.S. 17, 21 (1993). Carter simply has not met these standards. As defendant rightly argues, plaintiff has neither alleged nor proved any statements or actions by anyone that are even remotely racial in nature or character. Indeed, Carter's replacements in the Investigations Unit have all been African-American as well. Goldstein Dec. at ¶ 21.

Plaintiff's claims -- that defendant failed to provide him with a beeper, that Retas appointed Detective Parker to monitor his absences, and that he was demoted because he

challenged the alleged favoritism shown to two Caucasian employees who were arrested -- simply are not "severe or pervasive enough to create an objectively hostile work environment." Harris, 510 U.S. at 21. Nor are plaintiffs claims of repeated or continuous acts. *See* Kotcher v. Rosa and Sullivan Appliance Center, 957 F.2d 59, 62 (2d Cir. 1992) ("The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief.")

For these reasons, defendants' motion for summary judgment as to plaintiff's Title VII claims is granted.

III. Section 1981 and 1983 Claims

In his complaint, plaintiff claims that defendants denied him the right to make and enforce a contract under 42 U.S.C. § 1981[6] and that defendants denied him due process of law and discriminated against him on the basis of his race in

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[6] Section 1981 provides in relevant part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . " 42 U.S.C. § 1981(a). The term "make and enforce contracts" as used in this section includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

violation of 42 U.S.C. § 1983.[7] Complaint at ¶¶ 46-49 & 56-60.

In order to state a viable cause of action under both § 1981 and § 1983, plaintiff must allege that a municipal policy or practice existed which caused the violation of his constitutional rights. Monell v. Dept. of Social Services,436 U.S. 658, 691 (1978); Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989). Plaintiff has adduced no evidence that such a policy or practice existed beyond his conclusory allegations that "defendants followed a policy and practice of discrimination against plaintiff." Complaint at ¶47. As defendant rightly points out, "[c]onclusory allegations by a plaintiff of a municipality's pattern or policy of unconstitutional behavior are insufficient to establish a Monell claim, absent the production of evidence to back up such an allegation." Woo v. City of New York, 1996 U.S. Dist. LEXIS 11689, *14-15 (S.D.N.Y. August 12, 1996). Carter points only to his reassignment as evidence of KCHP and HHC's discriminatory pattern or policy. However, "a single incident alleged in a complaint . . . does not suffice to show a municipal policy." Ricciuti v. N.Y.C. Transit Authority, 941 F.2d 119, 123

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[7] Section 1983 provides in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the Untied States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . " 42 U.S.C. § 1983.

(2d Cir. 1991).

Defendants also correctly argue that Retas was not an official policymaker for the KCHC or the HHC. See Pembauer v. Cincinnati, 475 U.S. 469, 481 (1986)("Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered"). While defendants prove that Retas was not a policy maker by detailing the administrative policy making scheme of the HHC and the KHHC pursuant to N.Y. Unconsol. L. § 7384 (McKinney 1979), Plaintiff simply notes that Retas "instituted whatever policy affected the day-to-day operation of the KCHC," Pl. Memo of Law at 13, without pointing to any evidence to support his claim. As stated earlier, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. Because plaintiff has failed to interpose a genuine issue of fact, defendants' motion for summary judgment as to plaintiff's Section 1981 and 1983 claims is granted.

III. Pendent State Law Claims

Finally, regarding plaintiff's claims under Sections 296 and 297 of the New York State Executive Law, as the Second Circuit recently observed, "[w]e have frequently noted that

claims brought under New York State's Human Rights Law are analytically identical to claims brought under Title VII." Torres v. Pisano, 116 F.3d 625, 629 n.1 (2d Cir. 1997). See also Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 714-15 and 716 n.6 (2d Cir. 1996)(same); Ramos v. City of New York, 1997 WL 410493, *5 (S.D.N.Y. 1997)(same); Owens v. Waldorf-Astoria Corp., 1997 WL 251556 (S.D.N.Y. 1997)(same). Because of plaintiff's inability to establish a *prima facie* case under Title VII, this court similarly grants defendants' motion as to his state law claims.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgement is granted.

SO ORDERED.

United States District Judge

Dated: Brooklyn, New York
September 9, 1998

Copies of the foregoing Memorandum and Order were this day sent to:

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